IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2005 Session

IN RE ADOPTION OF WILLIAM DREW MUIR

Appeal from the Circuit Court for Marion County
No. 13722 Buddy D. Perry, Judge

No. M2004-02652-COA-R3-CV - Filed November 16, 2005

This is the second appeal arising out of a proceeding to terminate a biological father's rights to his now seven-year-old son. In 2000, the mother and her husband filed a petition in the Circuit Court for Marion County seeking to terminate the biological father's parental rights and to approve the husband's adoption of the child. They pursued the petition even after they were divorced, but in December 2002, the trial court denied the petition after concluding that they had failed to present clear and convincing evidence that the biological father had abandoned the child. This court vacated this order because the trial court had failed to make the statutorily required findings of fact. *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524 (Tenn. Ct. App. Nov. 25, 2003) (No Tenn. R. App. P. 11 application filed). Following the remand, the trial court entered new orders again denying the petition on the ground that the mother and her former husband had failed to establish by clear and convincing evidence that the biological father had abandoned the child. The mother and her former husband have appealed. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. J., joined. WILLIAM B. CAIN, J., filed a separate concurring opinion.

Lisa Z. Bowman, Chattanooga, Tennessee, for the appellants, Derrick Eugene Whited and April Muir Whited.

Marshall A. Raines, Jr., Jasper, Tennessee, for the appellee, Donald Ray Dalton.

OPINION

I.

Donald Ray Dalton[1] and April Holcomb had a non-marital child in 1996. Mr. Dalton, who was nineteen at the time, stopped seeing Ms. Holcomb for approximately eight months, and during

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[1]This court customarily uses pseudonymous designations for the parties in termination cases. However, we are not using the designations for this appeal because earlier appeals used the parties' names.

this time, he had a brief affair with seventeen-year-old April Ann Muir. Mr. Dalton's dalliance with Ms. Muir understandably piqued Ms. Holcomb, and she and Ms. Muir came to blows. Mr. Dalton cut off his romantic relationship with Ms. Muir and returned to Ms. Holcomb soon after he learned that Ms. Muir was pregnant with his child.

Mr. Dalton continued to have some interaction with Ms. Muir. He accompanied her on several visits to her obstetrician, and he purchased a changing table and a crib for the baby. William Drew Muir was born in Fort Oglethorpe, Georgia in March 1998. Ms. Muir pointedly declined to include Mr. Dalton's name on the birth certificate. Mr. Dalton briefly visited Ms. Muir and the child in the hospital and had four other brief visits with the child. Mr. Dalton's last visit with his son occurred in September 1998.

Within weeks after her son's birth, Ms. Muir began dating Derrick E. Whited whom she had met shortly after Mr. Dalton left her for Ms. Holcomb. She and Mr. Whited began living together in January 1999 and married in June 1999. Mr. Whited financially supported both Ms. Whited and her son and developed a parental relationship with the child. Eventually, the Whiteds had a child of their own.

In January 2000, the Whiteds filed a petition in the Circuit Court for Marion County seeking to terminate Mr. Dalton's parental rights and for the step-parent adoption of William Drew Muir by Mr. Whited. Mr. Dalton contested the petition. Mr. Dalton did not contact Ms. Whited directly about visiting his son after the petition was filed, and his lawyer's informal efforts to arrange visitation with the child were rebuffed. Between April and June 2000, Mr. Dalton forwarded four support checks to Ms. Whited, but she returned them on the advice of her lawyer.

The Whiteds divorced in November 2001. However, they insisted on proceeding with the step-parent adoption because Mr. Whited was the only father the child had ever known. Following a hearing on May 28, 2002 at which Ms. Whited, Mr. Dalton, and Mr. Whited testified, the trial court entered a perfunctory December 2, 2002 order denying the termination petition because "there had not been a willful abandonment by Defendant Donald Ray Dalton as to the minor child William Drew Muir." Ms. Whited appealed.[2]

In *In re Adoption of Muir*, No. M2002-02963- COA-R3-CV, 2003 WL 22794524 (Tenn. Ct. App. Nov. 25, 2003) (No Tenn. R. App. P. 11 application filed) (*Muir I*), this court held that the trial court's December 2, 2002 order declining to terminate Mr. Dalton's parental rights failed to satisfy the requirements of Tenn. Code Ann. § 36-1-113(k) (2005).[3] Accordingly, we vacated the trial

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[2]On March 25, 2003, the trial court entered another order directing Mr. Dalton to pay Ms. Whited $20,534.07 in back child support and childbirth expenses and to begin paying $78 per week in prospective child support. It also provided Mr. Dalton with defined, although limited, visitation rights. Mr. Dalton did not appeal the trial court's decisions regarding past and prospective child support.

[3]The statute provides that in all termination of parental rights cases, "[t]he court *shall* enter an order which makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing." Tenn. Code Ann. § 36-1-113(k) (emphasis added).

court's order and remanded the case to the trial court for the entry of an order complying with the statutory requirements.

After neither party asked to present additional evidence, the trial court requested the parties to submit proposed findings of fact and conclusions of law. In two substantially identical orders entered on September 23, 2004 and October 13, 2004,[4] the trial court adopted the version proposed by Mr. Dalton. The trial court specifically found that Ms. Whited was not a credible witness, that she did not want the child to have a relationship with Mr. Dalton, and that Ms. Whited, Mr. Whited, and members of Ms. Whited's family had blocked Mr. Dalton's access to the child and vigorously resisted his efforts to support and visit the child through the use of threats of force, violence, intimidation, and other forms of coercion.

On the basis of these facts, the trial court determined that Mr. Dalton had not willfully failed to support or visit the child. In addition, the trial court concluded that it would not be in the best interests of the child to terminate Mr. Dalton's parental rights because Mr. Dalton is the father of the child's half-sister, and the child should have an opportunity to develop a relationship with his half-sister. Accordingly, the trial court again denied the termination petition. Ms. Whited and Mr. Whited appealed.

II.
STANDARDS OF REVIEW IN TERMINATION OF PARENTAL RIGHTS CASES

A biological parent's right[5] to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions.[6] *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2059-60 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). While this right is fundamental and superior to the claims of other persons and the government, it is not absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). It continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002); *In re S.M.*, 149 S.W.3d 632, 638 (Tenn. Ct. App. 2004); *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004).

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[4]Aside from slight changes in formatting, the only difference between the trial court's September 23, 2004 and October 13, 2004 orders appears to be the inclusion at the end of the latter order of signature lines for the parties' attorneys indicating their approval of the form of the trial court's order.

[5]This right exists notwithstanding the marital status of the child's biological parents where a biological parent has established or is attempting to establish a relationship with the child. *Lehr v. Robertson*, 463 U.S. 248, 262, 103 S. Ct. 2985, 2993-94 (1983); *In re D.A.H.*, 142 S.W.3d 267, 274 (Tenn. 2004); *Jones v. Garrett*, 92 S.W.3d 835, 840 (Tenn. 2002); *In re Swanson*, 2 S.W.3d 180, 188 n.12 (Tenn. 1999). The right also extends to adoptive parents. *Simmons v. Simmons*, 900 S.W.2d 682, 684 (Tenn. 1995).

[6]U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8.

Termination proceedings in Tennessee are governed by statute. Parties who have standing to seek the termination of a biological parent's parental rights must prove two things. First, they must prove the existence of at least one of the statutory grounds for termination.[7] Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones v. Garrett*, 92 S.W.3d at 838. Second, they must prove that terminating the parent's parental rights is in the child's best interests.[8] Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d 541, 545 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

No civil action carries with it graver consequences than a petition to sever family ties irretrievably and forever. Tenn. Code Ann. § 36-1-113(i)(1); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S. Ct. 555, 565 (1996); *In re Knott*, 138 Tenn. 349, 355, 197 S.W. 1097, 1098 (1917); *In re D.D.K.*, No. M2003-01016-COA-R3-PT, 2003 WL 23093929, at *8 (Tenn. Ct. App. Dec. 30, 2003) (No Tenn. R. App. P. 11 application filed). Because the stakes are so profoundly high, Tenn. Code Ann. § 36-1-113(c)(1) requires persons seeking to terminate a biological parent's parental rights to prove the statutory grounds for termination by clear and convincing evidence. This heightened burden of proof minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d at 622.

Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *State Dep't of Children's Servs. v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. Aug. 13, 2003) (No Tenn. R. App. P. 11 application filed), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence, *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re S.M.*, 149 S.W.3d at 639; *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d at 733; *In re C.W.W.*, 37 S.W.3d at 474.

Because of the gravity of their consequences, proceedings to terminate parental rights require individualized decision making. *In re Swanson*, 2 S.W.3d at 188. Accordingly, Tenn. Code Ann. § 36-1-113(k) explicitly requires courts terminating parental rights to "enter written orders containing specific findings of fact and conclusions of law" whether they have been requested to do so or not. *In re S.M.*, 149 S.W.3d at 639; *In re M.J.B.*, 140 S.W.3d at 653-54. These specific findings of fact and conclusions of law facilitate appellate review and promote just and speedy resolution of appeals. When a lower court has failed to comply with Tenn. Code Ann. § 36-1-113(k), the appellate courts must remand the case with directions to prepare the required findings of fact and conclusions of law. *In re D.L.B.*, 118 S.W.3d at 367; *In re K.N.R.*, No. M2003-01301-COA-R3-PT, 2003 WL 22999427, at *5 (Tenn. Ct. App. Dec. 23, 2003) (No Tenn. R. App. P. 11 application filed).

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[7]The statutory grounds for terminating parental rights are found in Tenn. Code Ann. § 36-1-113(g).

[8]The factors to be considered in a "best interests" analysis are found in Tenn. Code Ann. § 36-1-113(i).

The heightened burden of proof mandated by Tenn. Code Ann. § 36-1-113(c)(1) requires us to adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact de novo in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent's parental rights. *Jones v. Garrett*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 548-49; *In re S.M.*, 149 S.W.3d at 640; *In re M.J.B.*, 140 S.W.3d at 654.[9]

III.
THE ABANDONMENT GROUND

The petition to terminate Mr. Dalton's parental rights rested solely on the ground for termination contained in Tenn. Code Ann. § 36-1-113(g)(1), i.e., "[a]bandonment."[10] As we noted in *Muir I*, it is essentially undisputed that Mr. Dalton did not visit or support the child for fifteen consecutive months immediately preceding the filing of the termination petition. Mr. Dalton argues that his conduct does not satisfy the statutory definition of abandonment because the record does not show that his failure to visit or support the child was willful. We agree.[11]

A.

The pivotal question in this case is whether Mr. Dalton's failure to visit or support his son for more than four consecutive months preceding the filing of the termination and adoption petition

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[9]These decisions draw a distinction between specific facts and the combined weight of these facts. Tenn. R. App. P. 13(d) requires us to defer to the trial court's specific findings of fact as long as they are supported by a preponderance of the evidence. However, we are the ones who must then determine whether the combined weight of these facts provides clear and convincing evidence supporting the trial court's ultimate factual conclusion. The Tennessee Supreme Court used this approach in *In re Valentine* when it recognized the difference between the conclusion that a biological parent had not complied substantially with her obligations in a permanency plan and the facts relied upon by the trial court to support this conclusion. *In re Valentine*, 79 S.W.3d at 548-49; *see also Jones v. Garrett*, 92 S.W.3d at 838-39.

[10]Tenn. Code Ann. § 36-1-102(1)(A)(i) defines abandonment as follows:

> For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

[11]Because we have concluded that the trial court correctly determined that the record does not contain clear and convincing evidence supporting the existence of the only ground for termination relied on by Ms. Whited and Mr. Whited, we need not address the trial court's further conclusion that the record does not contain clear and convincing evidence that terminating Mr. Dalton's parental rights would be in the best interests of the child. Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d at 367; *Jones v. Garrett*, 92 S.W.3d at 838.

was willful. The concept of "willfulness" is at the core of the statutory definition of abandonment. A parent cannot be found to have abandoned a child under Tenn. Code Ann. § 36-1-102(1)(A)(i) unless the parent has either "willfully" failed to visit or "willfully" failed to support the child for a period of four consecutive months. "Willfully" is a word of many meanings, and so each use of the word must be interpreted with reference to the statutory context in which it appears. *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996); *Muir I*, 2003 WL 22794524, at *5; GEORGE W. PATON, A TEXTBOOK ON JURISPRUDENCE 313 n.2 (4th ed. 1972) (suggesting that use of the word should be avoided because of its ambiguities).

In the statutes governing the termination of parental rights, "willfulness" does not require the same standard of culpability as is required by the penal code. *G.T. v. Adoption of A.E.T.*, 725 So. 2d 404, 409 (Fla. Dist. Ct. App. 1999). Nor does it require malevolence or ill will. *In re Adoption of a Minor*, 178 N.E.2d 264, 267 (Mass. 1961). Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir. 1997); *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994); *In re Adoption of Earhart*, 190 N.E.2d 468, 470 (Ohio Ct. App. 1961); *Meyer v. Skyline Mobile Homes*, 589 P.2d 89, 97 (Idaho 1979). Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so.[12] *In re M.J.B.*, 140 S.W.3d at 654; *see also Shorter v. Reeves*, 32 S.W.3d 758, 760 (Ark. Ct. App. 2000); *In re B.S.R.*, 965 S.W.2d 444, 449 (Mo. Ct. App. 1998); *In re Estate of Teaschenko*, 574 A.2d 649, 652 (Pa. Super. Ct. 1990); *In re Adoption of C.C.T.*, 640 P.2d 73, 76 (Wyo. 1982). Failure to visit or to support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, *In re Adoption of Lybrand*, 946 S.W.2d 946, 950 (Ark. 1997), or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child, *In re Serre*, 665 N.E.2d 1185, 1189 (Ohio Ct. C.P. 1996); *Panter v. Ash*, 33 P.3d 1028, 1031 (Or. Ct. App. 2001).[13] The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially. *Bateman v. Futch*, 501 S.E.2d 615, 617 (Ga. Ct. App. 1998); *In re Leitch*, 732 So. 2d 632, 636 n.5 (La. Ct. App. 1999).

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[12]A parent who fails to support a child because he or she is financially unable to do so is not willfully failing to support the child. *O'Daniel v. Messier*, 905 S.W.2d at 188; *Pierce v. Bechtold*, 60 Tenn. App. 478, 487, 448 S.W.2d 425, 429 (1969).

[13]Conduct that amounts to a significant restraint or interference with a parent's efforts to support or develop a relationship with a child includes: (1) telling a man he is not the child's biological father; (2) blocking access to the child; (3) keeping the child's whereabouts unknown; (4) vigorously resisting a parent's efforts to support the child; or (5) vigorously resisting a parent's efforts to visit the child. *In re S.A.B.*, 735 So. 2d 523, 524 (Fla. Dist. Ct. App. 1999); *In re Adoption of Children by G.P.B., Jr.*, 736 A.2d 1277, 1282 (N.J. 1999); *Panter v. Ash*, 33 P.3d at 1031; *Taxonomy of Children's Rights*, 11 WM. & MARY BILL RTS. J. at 957.

The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. *In re Adoption of S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 WL 2804892, at *8 (Tenn. Ct. App. Dec. 6, 2004) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000).

B.

At the hearing on the termination and adoption petition, Ms. Whited and Mr. Dalton presented dramatically different explanations for why Mr. Dalton did not support or visit the child in the months preceding the filing of the termination petition. Mr. Dalton insisted that he telephoned Ms. Whited at least twice a month requesting to visit his son, that she rebuffed him each time, and that he stopped trying to contact Ms. Whited in February 1999 because Mr. Whited had told him to stop bothering her and that "Will [already] had a father in his life." Mr. Dalton also testified that Ms. Whited, Mr. Whited, and members of Ms. Whited's family had threatened him and actively prevented him from visiting the child.

On the issue of support, Mr. Dalton claimed that Ms. Whited had refused all offers of financial support except for $150 that he paid towards Ms. Whited's childbirth expenses. He said he told Ms. Whited to call him if she ever needed any money but that she never did so. However, Mr. Dalton offered no explanation for his failure to send his son birthday or holiday presents, and he did not explain why, prior to the filing of the termination petition, he failed to resort to judicial procedures to establish his paternity of the child and his corresponding legal rights to visit and provide support for the child.

For her part, Ms. Whited insisted that she telephoned Mr. Dalton repeatedly and "begged" him to visit their son. According to Ms. Whited, Mr. Dalton "always had something better to do." She testified that Mr. Dalton told her in early 1999 that he still loved her and wanted to be with her but that he "couldn't see Will because of [Ms. Holcomb]." Ms. Whited denied Mr. Dalton's allegations that she prevented him from seeing his son and told him that she did not want financial support from him. However, Ms. Whited acknowledged that she was uncomfortable allowing the child to be around Ms. Holcomb because Ms. Holcomb had said that she "hated" Ms. Whited and the child.

On remand, the trial court entered two orders containing the specific findings of fact and conclusions of law required by Tenn. Code Ann. § 36-1-113(k). The trial court found that Ms. Whited was not a credible witness and, therefore, disbelieved her version of the disputed events. The trial court found that her actions, as opposed to her testimony, showed that she did not want Mr. Dalton to have a relationship with the child. The trial court found it particularly telling that Ms. Whited did not name Mr. Dalton as the child's father on the birth certificate.

By contrast, the trial court found credible Mr. Dalton's testimony regarding his fear of retribution if he sought to establish a relationship with the child. The trial court specifically found that Ms. Whited, Mr. Whited, and members of Ms. Whited's family had used threats of force, violence, intimidation, and other forms of coercion to block Mr. Dalton's access to the child. The court found that they had vigorously resisted Mr. Dalton's attempts to visit and support the child and that their actions amounted to a significant restraint of or interference with Mr. Dalton's efforts to develop a relationship with the child.

We have carefully reviewed the sparse record on appeal. The evidence in the record regarding willfulness consists primarily of the conflicting testimony of Ms. Whited and Mr. Dalton. Thus, the resolution of the issue of willfulness turns almost entirely on the credibility of these two witnesses. The trial court found that Ms. Whited was not a credible witness but that Mr. Dalton was. The trial court was in a much better position than this court to determine the relative credibility of the witnesses who testified at the hearing on the termination petition, *Jones v. Garrett*, 92 S.W.3d at 838; *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000), and we see no basis in the record for rejecting the trial court's credibility determinations. Accordingly, the record does not contain clear and convincing evidence that Mr. Dalton willfully failed to visit or support his child in the four months immediately preceding the filing of the termination and adoption, and we therefore affirm the trial court's denial of the petition to terminate Mr. Dalton's parental rights.

IV.

We affirm the trial court's denial of Ms. Whited and Mr. Whited's termination and adoption petition solely for the reasons stated in this opinion. We tax the costs of this appeal in equal proportions to April Muir Whited and Derrick Eugene Whited and their surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.